

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34574/34575

STATE OF IDAHO,)	2010 Unpublished Opinion No. 324
)	
Plaintiff-Respondent,)	Filed: January 26, 2010
)	
v.)	Stephen W. Kenyon, Clerk
)	
ESTEBAN M. GONZALEZ,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Jerome County. Hon. John K. Butler, District Judge.

Judgments of conviction for possession of a controlled substance and for unlawful possession of a firearm by a felon, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth Ann Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

WALTERS, Judge Pro Tem

This is a consolidated proceeding in two appeals involving the same defendant. In Docket No. 34574, Esteban M. Gonzalez appeals from a judgment of conviction entered upon a jury's verdict finding him guilty of possession of a controlled substance, methamphetamine, I.C. § 37-2732(c)(1). In Docket No. 34575, Gonzalez appeals from the judgment of conviction entered upon his plea of guilty to unlawful possession of a firearm by a felon, I.C. § 18-3316. In the first case, Docket No. 34574, Gonzalez asserts that his right to a fair trial was violated due to three instances of alleged prosecutorial misconduct, to which Gonzalez did not object during the trial. In the other case, Docket No. 34575, Gonzalez contends that the district court abused its sentencing discretion by imposing an excessive sentence without properly considering mitigating factors. We affirm the judgments of conviction in both cases.

I.
BACKGROUND

The following facts appear in the record of Gonzalez's trial for possession of a controlled substance in Docket No. 34574. Gonzalez was stopped by Officer Clark of the Jerome City Police Department for erratic driving. Gonzalez did not have a driver's license with him, and Gonzalez told Officer Clark that he did not own the vehicle but that he was driving it with the owner's permission. When the officer radioed his dispatch center to find out whether Gonzalez had a valid driver's license, the officer was informed that there was an outstanding warrant for Gonzalez's arrest on a pending burglary charge. The officer arrested Gonzalez on the warrant and, after another officer arrived at the scene, conducted a search of the vehicle operated by Gonzalez. During the search, the police found in plain view on the center console area of the vehicle a white powdery substance later determined to be methamphetamine. They also discovered a knife concealed under the console tray where they had found the methamphetamine, and they recovered a loaded handgun that was under the passenger seat in the car. Gonzalez indicated to Officer Clark that the methamphetamine was his, but he claimed not to know the gun was in the car. He told the officer that the gun might belong to a friend named LoLo to whom Gonzalez had loaned the car earlier that day.

The state charged Gonzalez with possession of methamphetamine, a felony, and with two misdemeanor counts of carrying a concealed weapon. At trial, the owner of the vehicle testified for the defense that he had loaned the car to Gonzalez and that the knife hidden in the car was his. Gonzalez testified that he did not know that the gun, knife or methamphetamine were in the car. The jury found Gonzalez guilty of possession of the methamphetamine, but not guilty of the two concealed weapons charges.

While awaiting sentencing, Gonzalez was arrested in another case, No. 34575. In that case, Gonzalez pled guilty to possession of a firearm by a felon. The district court set both cases for sentencing. On the conviction for possession of methamphetamine, the district court imposed a unified sentence of five years with one year fixed, suspended the sentence and retained jurisdiction for 180 days. For Gonzalez's conviction for possession of a firearm by a felon, the district court imposed a unified sentence of five years with two years fixed and also retained

jurisdiction for 180 days concurrent with the sentence on the methamphetamine charge. At the end of the retained jurisdiction period, the district court held a review hearing. The court placed Gonzalez on probation for a period of three years in both cases.¹ Gonzalez timely appealed in both cases.

II.

DISCUSSION

A. Fair Trial (Docket No. 34574).

Gonzalez asserts that his right to a fair trial was violated in Docket No. 34574 as a result of the prosecutor's misconduct in commenting upon Gonzalez's failure to present evidence of his innocence, in appealing to the passion and prejudices of the jury by comparing his case to the O.J. Simpson case, and in misrepresenting the evidence to the jury. The three instances of alleged misconduct occurred during the prosecutor's summation of the case to the jury and Gonzalez did not object to any of the statements at the time they were made.

The first such instance was when the prosecutor made reference to the lack of evidence to support Gonzalez's testimony that another person, LoLo, might have left the methamphetamine and loaded gun in the car when LoLo returned the car to Gonzalez after borrowing it for a trip to Twin Falls. The second instance was when the prosecutor commented further on Gonzalez's testimony that someone else had left the methamphetamine and loaded gun in the car, stating that "That's always the defense. Think about O.J.: Some other dude did it." The final instance, of alleged misstatement of the evidence, occurred when the prosecutor stated to the jury: "We didn't hear anything from the defendant that LoLo used meth, but he didn't say anything about LoLo being high when he came back from Twin Falls." On appeal, Gonzalez points to his testimony in the record when in response to the state's question on cross-examination, Gonzalez identified LoLo as one of his friends who use methamphetamine.

The Idaho Supreme Court has explained the standard of review where, as here, there was no objection at trial to a comment by the prosecution which is later asserted on appeal as a basis

¹ During the pendency of this appeal, the state filed a motion to revoke Gonzalez's probation in Docket No. 34575. Gonzalez admitted three probation violations. The district court revoked Gonzalez's probation, imposed the original sentence, suspended that sentence and placed Gonzalez on probation for a renewed three-year period.

for prosecutorial misconduct. In *State v. Severson*, 147 Idaho 694, 715-16, 215 P.3d 414, 435-36, the Court said:

On appeal, the standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial. As a general rule, we will not consider arguments made for the first time on appeal. *State v. Sharp*, 101 Idaho 498, 503, 616 P.2d 1034, 1039 (1980). When the alleged error constitutes a fundamental error, however, review on appeal is permissible. *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262 (1971). Accordingly, when an objection to prosecutorial misconduct is not raised at trial, the misconduct will serve as a basis for setting aside a conviction only when the “conduct is sufficiently egregious to result in fundamental error.” *State v. Porter*, 130 Idaho 772, 785, 948 P.2d 127, 140 (1997). Misconduct will be regarded as fundamental error when it “goes to the foundation or basis of a defendant's rights or . . . to the foundation of the case or take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.” *State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989) (quoting *State v. Garcia*, 46 N.M. 302, 128 P.2d 459, 462 (1942)). “However, even when prosecutorial misconduct has resulted in fundamental error, the conviction will not be reversed when that error is harmless.” *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). Under the harmless error doctrine, a conviction will stand if the Court is convinced beyond a reasonable doubt that the same result would have been reached by the jury had the prosecutorial misconduct not occurred. *State v. LaMere*, 103 Idaho 839, 844, 655 P.2d 46, 51 (1982).

1. Prosecutor’s statement allegedly commenting on Gonzalez’s failure to present evidence of his innocence.

The first challenged statement by the prosecutor flows from the prosecutor’s review of the evidence presented to the jury. The prosecutor asked the jurors to use their common sense in determining who to believe with respect to the methamphetamine found by the officer on the console in Gonzalez’s vehicle. The prosecutor did not argue to the jury that Gonzalez had the burden to prove that he was innocent by presenting any testimony from his friend, LoLo. In context, the prosecutor’s statements were:

Your job here today, as you well know, is to determine the facts based on the evidence that was presented to you in court.

How do you go about doing that? First off is to use your common sense. You get to decide who you believe from the testimony that was presented to you. Officer Clark has been in his position for seven years. He’s had a great deal of training in identifying drugs. He told you about what he believed the circumstances were with the defendant and the methamphetamine on the console. If it had been there for any period of time it would have blown around. It would have been on the floor, it would have been on the seats, between the seats, but it

wasn't. It was on the console. You get to use your common sense. You walked into the courtroom here with all of the tools that you need to make a decision on the case in front of you.

Think about the meth, then think about the defendant's statement that LoLo used methamphetamine. If LoLo used meth, would he have left that pile of meth sitting in that console? We don't think so. We think it's unreasonable and that the story lacks credibility. Think about how long the defendant had to find out LoLo's whole name and give it to the police. He didn't do that. Why not?

We believe he didn't do that not because he wanted to protect LoLo, because if it wasn't his meth it's reasonable to assume that he'd have gone after him immediately and found out who he was and what was going on and he'd have given that information to law enforcement, and we wouldn't be here if that were the case.

Think about the loaded gun. Does it make sense that LoLo, who borrowed the car from the defendant, who had borrowed the vehicle originally, would he have left that loaded gun under the seat? He only borrowed it for a few hours. That doesn't make sense.

Use your common sense. Think about all of the instructions. It's your obligation to find the facts and based on the law that's been given to you and those instructions that you hold in your hands to find the defendant guilty or not guilty, and on that basis we ask that you find him guilty on all charges. Thank you.

Here, the prosecutor was clearly commenting on the differences in the testimony given by Gonzalez and Officer Clark and the inconsistencies between what Gonzalez told Officer Clark on the night of Gonzalez's arrest and what Gonzalez testified to at trial. The prosecutor was also reminding the jury that it was up to the jury to evaluate the credibility of each witness and determine the facts based on the evidence presented at the trial. He asked the jury to consider the plausibility of Gonzalez's story. At no point did the prosecution tell the jury that Gonzalez had to prove his innocence. Furthermore, the jury received instructions informing them that the state had the burden of proving its case beyond a reasonable doubt, that Gonzalez was not required to prove his innocence or produce any evidence, that the jury should evaluate the witnesses' credibility and were to determine the facts from the evidence given. We conclude that the prosecutor's comments complained of were not improper nor did they constitute prosecutorial misconduct.

2. Reference to O.J. Simpson's case.

The next assertion by Gonzalez of prosecutorial misconduct claims that the prosecutor appealed to the passions and prejudices of the jury by equating Gonzalez's case to O.J. Simpson's high-profile murder case. Prosecutorial misconduct rises to the level of fundamental

error if it is calculated to inflame the minds of the jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside of the evidence. *State v. Babb*, 125 Idaho 934, 942, 877 P.2d 905, 913 (1994). *See also State v. Phillips*, 144 Idaho 82, 87-89, 156 P.3d 583, 587-88 (Ct. App. 2007) (it is impermissible for a prosecutor to appeal to the emotion, passion or prejudice of the jury through the use of inflammatory tactics).

The prosecutor's comments in context on the point are as follows:

[The] Defense would like you to think that Mr. Gonzalez was in the wrong place at the wrong time with the wrong meth and the wrong loaded weapon. That doesn't happen. They want you to think that it was somebody else's meth and somebody else's gun. That's the defense. That's always the defense.

Think about O.J.: Some other dude did it. Think about the defendant's stories to the officer. Why would he say he was going to a friend's house at 3:45 in the morning when he was going to his dad's house? Why would he say at one point that he was working on the date of the incident and then say that he was hanging out with Angel at Angel's house all day? Stuff happens, and when people get into trouble they don't keep their stories straight. That's a fact of life.

Gonzalez argues that the prosecutor's brief reference to "O.J." was clearly intended to have the jury equate Gonzalez's case with the Simpson case and appeal to the passions and prejudices of the jury. Gonzalez supports his claim with cases from other jurisdictions where courts have found prosecutorial remarks about infamous criminal cases improper.

The state adequately distinguishes the cases cited by Gonzalez, in the state's responsive brief on appeal. The cited cases involved far more extensive remarks about the Simpson case than the brief reference to "O.J." made here in Gonzalez's case. The prosecutor in Gonzalez's case drew no parallels between Simpson's crime or character and Gonzalez's. By comparison, the prosecutor's single, brief reference to "O.J.," though perhaps improper, does not rise to the level of fundamental error.

When considered in its entire context, the prosecutor was simply responding to Gonzalez's testimony and the defense when she made the brief reference to "O.J." We conclude the comment could not have so inflamed the passions and prejudices of the jury so as to deprive Gonzalez of a fair trial when the jury found Gonzalez guilty of only one of the three charges against him: possession of methamphetamine. The jury found Gonzalez not guilty of the two counts of concealing a dangerous weapon, indicating the jury believed Gonzalez's testimony that he did not know the gun or knife were hidden in the car and that the jury did not believe the

weapons belonged to Gonzalez. Furthermore, the jury was instructed that “[n]either sympathy nor prejudice should influence [them] in [their] deliberations.”

3. Alleged misstatement of the evidence.

Finally, Gonzalez asserts that the prosecutor misstated the evidence during the state’s rebuttal closing argument. The prosecutor’s statement, in context, is as follows:

If that was somebody else’s meth they wouldn’t have left it there. We didn’t hear anything from the defendant that said that LoLo used meth, but he didn’t say anything about LoLo being high when he came back from Twin Falls. He knew about the meth because it was his meth.

Officer Clark testified that when he arrested Gonzalez and told him about the additional charges after finding the methamphetamine and gun in the car, Gonzalez “indicated that he didn’t know that the gun was in there and that the powdery substance that appeared to be meth at the time was his” However, at trial Gonzalez testified that he did not see the methamphetamine in the vehicle that night and did not know there was methamphetamine in the car at all. Gonzalez denied that he was trying to implicate LoLo for possessing the methamphetamine, but testified that some of his friends, including LoLo, use methamphetamine.

Although the prosecutor’s statement, quoted above, is contrary to Gonzalez’s testimony about the use of methamphetamine by LoLo, the record does not show that the prosecutor purposefully misstated the evidence. The context of the entire rebuttal closing argument demonstrates that the prosecutor was attempting to counter Gonzalez’s testimony that LoLo was a methamphetamine user. In fact, earlier, the prosecutor had specifically referenced Gonzalez’s claim that LoLo used methamphetamine. It is clear from the context of the prosecutor’s statements that the prosecutor was simply arguing to the jury that if the substance was LoLo’s methamphetamine it was highly unlikely that LoLo would have left it in the car and that there was no evidence that LoLo was under the influence of methamphetamine when he returned the vehicle to Gonzalez that night. Furthermore, the jury received instructions that they were the “sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts” in the case.

The jury also was instructed that the arguments of the attorneys were not evidence. As suggested by the state in its responsive brief, at best Gonzalez has pointed out an innocent slip of the tongue or even a transcription error, but not that the prosecutor deliberately misstated the evidence and committed misconduct that deprived Gonzalez of a fair trial.

We conclude that none of the prosecutor's statements of which Gonzalez complains was improper, nor did they constitute prosecutorial misconduct that deprived Gonzalez of a fair trial.

B. Sentence Review (Docket No. 34575).

In Docket No. 34575, the district court imposed a unified sentence of five years with two years fixed for possession of a firearm by a felon. On this appeal, Gonzalez asserts that the sentence imposed by the district court is excessive in light of the facts of his case. Specifically, he claims that the district court failed to properly consider mitigating factors including his acknowledgment of a substance abuse problem.

An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982).

Applying these standards, and after reviewing the record in this case, we conclude that Gonzalez's sentence is not unreasonable or excessive and that no abuse of discretion has been shown. Contrary to Gonzalez's argument, the comments of the district court during the sentencing proceeding show that the court specifically considered mitigating circumstances raised by Gonzalez. Each time Gonzalez came before the court for sentencing in this case, the district court considered Gonzalez's substance abuse problem and desire for treatment among other factors.

At the initial sentencing hearing, the court reviewed the substance abuse evaluation completed by Gonzalez. The court determined that a period of retained jurisdiction might be useful for purposes of rehabilitation. Subsequently, at Gonzalez's retained jurisdiction review

hearing, the court again reiterated that while protection of society was of primary concern, the court would focus on rehabilitation as well as deterrence and retribution. Based on those considerations and the amended presentence investigation report recommending that Gonzalez be placed on probation, the court placed Gonzalez on probation giving him the opportunity to complete a substance abuse program and attend AA and NA meetings with a sponsor. However, once on probation, Gonzalez admitted to violating three conditions of probation: failing to attend AA and NA meetings, failing to take urinalyses tests, and admitting to using both marijuana and methamphetamine. Although the court determined that Gonzalez has refused to take advantage of rehabilitation opportunities previously afforded him through probation and the retained jurisdiction program, the court nonetheless held the disposition open and gave Gonzalez another 90 days to further evaluate his performance. At the expiration of that time, the court held a hearing and considered Gonzalez's statements regarding his progress in substance abuse treatment and willingness to comply with the conditions of probation. The court revoked Gonzalez's probation, imposed the original five-year unified sentence, but then again suspended the sentence and placed him on probation for a period of three years.

The record clearly shows that the district court continuously has taken into account Gonzalez's substance abuse problem, not only when sentencing him in this case, but several times on review of his progress. We find no abuse of discretion in the sentence imposed.

III.

CONCLUSION

The prosecutor did not commit misconduct that deprived Gonzalez of a fair trial in Docket No. 34574. The district court did not abuse its sentencing discretion in imposing a unified sentence of five years with two years fixed for possession of a firearm by a felon, in Docket No. 34575. The judgments of conviction in both cases are affirmed.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**